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No. 83-1919

In The

Supreme Court of the United States

October Term, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

v.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CITY OF OKLAHOMA CITY, PETITIONER

BURCK BAILEY
Counsel of Record

MARGARET MCMORROW-LOVE
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2400 First National Center
Oklahoma City, Oklahoma 73102
(405) 232-0621
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municipality liable in damages under 42 U.S.C. §1983.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 728 F.2d 456 (Feb. 28, 1984). The judgment of the United States District Court for the Western District of Oklahoma is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 28, 1984. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed on May 24, 1984, and said Petition was granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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STATUTORY PROVISION

The pertinent provisions of 42 U.S.C. §1983 are as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or any proceeding for redress."

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STATEMENT

On May 22, 1981, Rose Marie Tuttle filed a complaint in the United States District Court for the Western District of Oklahoma naming as defendants, the City of Oklahoma City and Julian Rotramel, a police officer of the Oklahoma City Police Department. She filed suit individually and as administratrix of the estate of decedent, William A. Tuttle. The complaint sought recovery under 42 U.S.C. §§1983, 1985, 1986 and 1988.

Plaintiff charged that Oklahoma City inadequately trained its police officers. She alleged that the training provided by Oklahoma City to its officers was so poor that it amounted to a willful, wanton and malicious act constituting gross negligence. The City denied the allegations of the complaint and specifically asserted that the death of William Tuttle did not result from any official policy or custom of the City of Oklahoma City.

Officer Julian Rotramel had attended and successfully completed 18 weeks of training at the Oklahoma City Police Academy. He graduated with high marks in December of 1979. (Tr. 334, 335.) The Police Academy provided approximately 700 hours of training, although only 120 were required by Oklahoma law, 70 O.S. 1981 §3311. The courses covered a variety of topics, including the civil rights of citizens, the civil and penal codes of the City of Oklahoma City and the procedures to be followed for dealing with citizens within the geographic boundaries of the City. (Tr. 326.) Following his graduation from the Police Academy, Officer Rotramel rode for several months with a senior patrolman assigned to the different areas of Oklahoma City. During this time, he performed in a satisfactory manner. In accordance with Department policy, he was allowed then to ride "solo" in a police cruiser. (Tr. 198-201.)

On the evening of October 4, 1980, the Oklahoma City Police Department received a telephone report that an armed robbery was in progress at the "We'll Do Club," a drinking establishment. The caller described the robber as white, having brown hair, approximately 37 years old and wearing colored glasses. (Tr. 532.) The caller also reported that the robber had a gun. (Tr. 607, 608.) All such calls to the Oklahoma City Police Department are

tape-recorded. William Tuttle's wife, plaintiff herein, later identified the voice on the police department tape of the call as that of her deceased husband. (Tr. 533.) The description William Tuttle gave of the "robber" matched his own appearance. William Tuttle had quarreled with his wife that day. He had gone to the bar where he remained on and off all day and into the night, consuming alcoholic beverages. (Tr. 25.) After making the phone call, William Tuttle informed one of the patrons of the bar that he "was going to be shot that night." (Tr. 599.) Witnesses also described him as shaking and stating that nothing was wrong anymore. (Tr. 44.)

The dispatcher for the Oklahoma City Police Department sent out an all points bulletin of a robbery in progress at the We'll Do Club, and described the robber. Officer Rotramel, patrolling in the immediate vicinity, responded to the call. He arrived at the club, parked his police vehicle and entered the bar. (Tr. 537.)

The testimony of what occurred after Officer Rotramel entered the bar was in conflict. Officer Rotramel testified as follows: upon entering the bar, he observed 10 to 15 people. William Tuttle looked toward the officer and began walking towards him. Rotramel reached out, took hold of William Tuttle's arm and requested that he stay within the bar. When Tuttle tried to walk past Rotramel again, the officer requested that he "stay put" and Tuttle responded "why." The officer proceeded to question a barmaid, Vonnie Hinds. During the questioning, Tuttle attempted to bend towards his boots and continued to try to squirm loose from the officer's grip and leave the bar. (Tr. 539, 540.) Tuttle broke away from Officer Rotramel, who proceeded to order Tuttle to "halt," which

command was ignored. (Tr. 541.) Tuttle cleared the door which sprang shut in front of Officer Rotramel. Rotramel pulled his service revolver from its holster and went out the door in pursuit of Tuttle. Since Tuttle matched the description of the robber and had broken loose, Rotramel thought Tuttle was in fact the robber.

Outside the bar, Rotramel saw Tuttle in a crouched position with his hands located in or near his boot. Due to the position of the door, the patrons inside were not able to see Tuttle's actions or what occurred after he left the bar. Rotramel ordered Tuttle to halt. Tuttle started to come up from his crouched position, at which time Rotramel discharged his weapon. The officer stated that he discharged his weapon in the belief that Tuttle had recovered a gun from his boot and was preparing to use it on him and that his life was in jeopardy. (Tr. 543.)

Following the shooting, Tuttle was transported by ambulance to the Baptist Medical Center in Oklahoma City. During the course of his medical treatment, medical personnel disrobed him. When his boot was removed, a toy cap pistol fell to the cart. (Tr. 455.) He was pronounced dead at 9:22 p.m.

The trial commenced on May 28, 1982. During the course of the trial, plaintiff introduced no evidence of any prior incidents of violence or improper conduct or excessive use of force on the part of Officer Rotramel. Likewise, there was no testimony of any prior incidents of violence, misconduct, or unauthorized or excessive use of force by any officer on the Oklahoma City Police Department. The only incident brought before the jury for consideration was the discharge of a weapon by Officer Rot-

ramel on the evening of October 4, 1980, resulting in the death of William Tuttle.

During the course of the trial, extensive testimony was presented by both sides regarding the training received by Oklahoma City police officers in general and the specific training received by Officer Rotramel at the Oklahoma City Police Academy. The record is replete with examples of the detailed care given to the training of each candidate for a position of police officer with the City of Oklahoma City. The testimony as to the curriculum at the Academy revealed the extensive training Rotramel himself went through before he was allowed on the streets as an officer. Plaintiff introduced § 9.03 and § 17.01 of the Oklahoma City Police Department's Operation Manual concerning the use of firearms by law enforcement officials and the use of force in making arrests. (Tr. 90, 91.) This official policy manual provided, *inter alia*, that "a police officer is justified in using his firearm only in defense of life and instances where the suspect is armed and/or making an attempt to kill or do great bodily harm." (Tr. 92.)

Former Oklahoma City Chief of Police, Tom Heggy, testified that the Oklahoma City Police Academy had for years been rated one of the top three police academies in the Nation. (Tr. 368.) Rotramel stated that he had been trained in the policies and procedures of the Oklahoma City Police Department, and specifically trained in the provisions of paragraphs 9.03 and 17.05, concerning the use of deadly force. Rotramel testified that Tuttle "matched the description of the armed robber." (Tr. 132.) He testified:

"Q. Officer Rotramel, why did you shoot William Adam Tuttle?

A. I felt like that he had recovered a weapon and was preparing to use it on me in order to make his escape.

Q. Did you feel your life was in danger?

A. Yes, sir. I did." (Tr. 544.)

The jury returned its verdict on the evening of June 3, 1982 in favor of the plaintiff and against the City of Oklahoma City in the amount of $1,500,000. The jury returned its verdict in favor of the co-defendant, Julian Rotramel, and against the plaintiff. On June 4, 1982, the Court entered judgment pursuant to the verdicts.

The City of Oklahoma City filed a motion for Judgment Notwithstanding the Verdict on June 24, 1982, which was overruled on August 11, 1982. An appeal was brought by the City of Oklahoma City to the United States Court of Appeals for the Tenth Circuit. A cross-appeal was filed by Rose Marie Tuttle from the decision rendered by the jury in favor of Officer Rotramel. On June 28, 1984, the Court of Appeals entered its opinion affirming the judgment below. The principal issue on appeal was whether a single isolated occurrence of the use of excessive or deadly force results in municipal liability under 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

The City of Oklahoma City asserted throughout the case that it could not be held liable in damages under 42

U.S.C. § 1983 for a single isolated incident of the use of excessive force by a member of its police department. There was a complete absence of proof at trial of any prior incidents of the use of excessive force by any member of the police force. Similarly, plaintiff presented no proof of the "known" propensity of Julian Rotramel for violence.

Plaintiff focused throughout the trial on the alleged failure of the City to train Rotramel with reference to the appropriate manner of approaching and entering a "blind" building in response to a call of an armed robbery in progress. However, such evidence is irrelevant to the sole issue involved herein. The shooting incident did not occur in the bar but rather occurred on a sidewalk outside the bar after the decedent broke from the officer's grasp and ran through the door. The City of Oklahoma City asserts that the single act of Rotramel in shooting Tuttle outside the We'll Do Club does not establish an "official policy or custom" of Oklahoma City. In such instances, a municipality, such as the City of Oklahoma City, may not be held liable for damages under 42 U.S.C. § 1983.

ARGUMENT

A Municipality May Not Be Held Liable for Damages Under 42 U.S.C. §1983 Absent an Established Policy or Custom with Reference to the Use of Excessive Force.

A. Instruction to the Jury.

The trial court instructed the jury:

"... [b]ut a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an

inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." (J.App. 44).

This instruction was given with reference to the elements necessary to establish the liability of a municipality under 42 U.S.C. § 1983. Under these instructions, the jury returned a verdict against the City of Oklahoma City in the amount of $1,500,000.

The United States Court of Appeals for the Tenth Circuit affirmed the verdict against Oklahoma City. The Court stated:

"Contrary to the present contention of appellant, the trial judge, in outlining the standard, required proof of the City's *gross negligence*. The jury was told that inadequate training of Rotramel amounting to gross negligence and deliberate indifference to the rights of the decedent was necessary in order to deprive the decedent of his right to liberty and life without due process. In other words, the gross negligence standard was plainly set forth as it pertains to the civil right claim under § 1983.

"The instructions were not erroneous. The gross negligence-indifference standard was sufficient as instructed. As a result the court was correct in denying dismissal relief to the City." 728 F.2d at 460.

Thus the question: May a municipality be found liable under § 1983 on the ground that one of its police officers committed an act from which the trier of fact could infer that the officer was so inadequately trained as to constitute gross negligence or deliberate indifference on the part of the municipality? Or, must the proof show that the unconstitutional deprivation was the result of official policy or custom on the part of a municipality?

B. Decisions of this Court.

In *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court determined that an analysis of the legislative history of the Civil Rights Act of 1871 compelled the conclusion that Congress did intend municipalities and other local government units to be included among the definition of persons to whom § 1983 applies.[1] 436 U.S. at 690. However, this Court held that a municipality could be held liable only where the action that is alleged to be unconstitutional implemented or executed a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or where the deprivation occurred "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decision-making channels." 436 U.S. at 690-691.

The Court in *Monell* did not engage in an extensive discussion of what constituted an official policy or a custom of a municipality. Guidance is found in the Court's prior opinion in *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), wherein the Court determined that the custom or usage required for state involvement was not merely a practice that reflected long standing habits observed by people in a particular locality. Rather, the Court concluded that "custom or usage" as used in § 1983 means that it must have the force of law by virtue of "persistent practices" of state officials.

Following this reasoning, this Court subsequently emphasized that local governments are liable under § 1983

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[1] States continue to enjoy immunity from suit under 42 U.S.C. § 1983 by virtue of the Eleventh Amendment.

only for deprivations caused by unconstitutional official policies or customs. *Polk County v. Dodson*, 454 U.S. 312 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980). No decision of this Court has established municipal liability on any other basis. Petitioner has been unable to find a decision of this Court addressing the issue of what constitutes custom or policy of a municipality in matters involving allegations of improper training or the use of excessive force.

C. Decisions of the Federal Courts.

Following this Court's pronouncement in *Monell v. New York City Dept. of Soc. Serv., supra*, the federal courts have struggled with the problem of formulating guidelines to determine when a municipality may be liable under § 1983. These guidelines are in considerable disarray. In *Languirand v. Hayden*, 717 F.2d 220 (5 Cir. 1983), a police officer named Hayden, who was on the police force of defendant, City of Pass Christian, Mississippi, responded to a radio call concerning a prowler. He saw Languirand's car parked near the residence of the person who had reported the prowler. As Languirand's car started to drive away, Hayden fired his revolver at the car. The bullet struck Languirand in the base of the neck. The verdict by the jury in *Languirand* was identical to the verdict in the case at bar: the jury found in favor of Police Officer Hayden but against the City of Pass Christian for $1,500,000. The theory advanced by Languirand was identical to the theory advanced by plaintiff in the instant case. That theory, as stated by the Fifth Circuit Court of Appeals, was:

> "The theory of the plaintiff's suit against the City was that Hayden was inadequately trained, particular-

ly in the use of his pistol, and that the shooting of Languirand was, as this contention was phrased in the trial court's charge to the jury, 'a proximate result of the alleged policy or custom of the City of Pass Christian of placing armed officers on the streets without adequate training in the use of weapons or firearms'." 717 F.2d at 222, 223.

The Fifth Circuit reversed the judgment against the City of Pass Christian. It found no controlling decision in making its determination:

> "Our research discloses no decision of the Supreme Court, or of this Court, which has made any holding, or given authoritative direction, on the issue of the liability under section 1983 of a governmental unit for injuries resulting from the lack of adequate training of its personnel." 717 F.2d at 225.

The Fifth Circuit reviewed all available authorities on the issue and found that the decisions were not "harmonious." The Fifth Circuit held:

> " . . . that a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, *in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.*" 717 F.2d at 227, 228. (Emphasis supplied.)

The Fifth Circuit noted that Officer Hayden had not been given *any* formal police training whatsoever. This contrasts markedly with the facts in the instant case, where Officer Rotramel had successfully completed an intensive 18-week course at an outstanding police academy.

In concluding that the evidence in *Languirand* was insufficient to meet the *Monell* test, the Fifth Circuit stated:

> "There is simply no evidence that the City, or its police force, had any policy or custom of resort to weapons, or other employment of significant force, in circumstances which might be deemed improper, unnecessary, or dangerous. There was no evidence of any other incident which involved, or which anyone claimed involved, police misconduct or even any simple negligence on the part of the police. Apart from the incident in question, there was no evidence that any police officer had ever acted, or was claimed to have acted, in an improper or negligent manner, or even that any citizen had been injured, or exposed to risk of injury, in *any* incident involving the police. There was no evidence that anyone on the police force, other than Hayden, lacked sufficient skill, training, and experience to be qualified for and able to adequately perform the position he or she held. There is simply no evidence that the City had any policy or custom of placing armed officers on the streets who lacked adequate training, skill, and experience in the use of firearms.
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> • • •
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> "What we are dealing with here, so far as this record discloses, is one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol, and this officer's inadequacies resulted in one particular incident of negligent or grossly negligent injury to a citizen. Grievous and regrettable as that incident and injury indisputably are, that does not convert this case to one of municipal policy or custom under section 1983." 717 F.2d at 228, 229.

The foregoing comments by the Fifth Circuit could apply without changing a word to the case at bar.

At approximately the same time *Languirand* was decided by the Fifth Circuit Court of Appeals, the case of *Wellington v. Daniels,* 717 F.2d 932 (4 Cir. 1983), was decided by the Fourth Circuit Court of Appeals.[2] The Fourth Circuit reached the same conclusions as the Fifth Circuit; to-wit, a single act or isolated incident is insufficient to establish municipal liability under § 1983.

In *Wellington,* the action was brought by the guardian of the Estate of Robert Gravelle. One Daniels, police officer for the City of Newport News, Virginia, struck Gravelle in the head with a Kel-lite flashlight. The injury resulted in body paralysis. Plaintiff predicated the action against the City of Newport News on "their failure to train and supervise properly the police department in the use of Kel-lite flashlights as weapons." 717 F.2d at 934. The result at trial was, once again, identical to the result in the instant case; the jury found against the plaintiff and in favor of the police officer, but returned its verdict against the city in the amount of $1,500,000. The plaintiff in *Wellington* used the same "expert witness" as Tuttle used in the instant case: one Dr. Kirkham. Dr. Kirkham

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2 Both *Languirand* and *Wellington* were brought to the attention of the Tenth Circuit Court of Appeals. The City filed a supplemental memorandum January 19, 1984, advising the Tenth Circuit that these cases had been decided since the briefs had closed. The City also urged the Court's consideration of them during oral argument. The Tenth Circuit made no reference to the cases in its opinion herein. Thereafter, when the Fifth Circuit and the Eleventh Circuit decided *Bennett v. City of Slidell,* 728 F.2d 762 (5 Cir. 1984), on petition for rehearing, 735 F.2d 861 (5 Cir. 1984); *Webster v. City of Houston,* 735 F.2d 838 (5 Cir. 1984); and *Gilmere v. City of Atlanta, Ga.,* 737 F.2d 894 (11 Cir. 1984), they ignored the Tenth Circuit's opinion herein.

testified that in his opinion the Newport News Police Department was "clearly deficient" in its failure to train police officers in the use of Kel-lite flashlights. His testimony in the instant case was essentially identical to his testimony in *Wellington.*

The Court of Appeals for the Fourth Circuit affirmed the district court's decision to enter judgment notwithstanding the verdict in favor of the City of Newport News. The court stated:

> "In its most recent pronouncement on municipal liability under §1983, the [Supreme] Court made clear that a local government is liable under §1983 only for deprivations caused by *unconstitutional* official policies or customs." (Emphasis by Court.) 717 F.2d at 935.

The Fourth Circuit noted:

> "Indeed, Gravelle could point to only the single incident during which the ward of the estate was injured on which to predicate the Police Chief's supervisory and the City's municipal liability. . . . Therefore, the district court appropriately granted the j.n.o.v. There simply was not sufficient evidence to support a finding of City policy to allow use of a dangerous instrumentality, or any encouragement by Chief Austin of such use." 717 F.2d at 937.

The Fifth Circuit Court of Appeals has been sharply divided in two recent cases since *Languirand,* to-wit, *Bennett v. City of Slidell,* 728 F.2d 762 (5 Cir. 1984), on petition for rehearing, 735 F.2d 861 (5 Cir. 1984); *Webster v. City of Houston,* 711 F.2d 35 (5 Cir. 1983), on petition for rehearing, 735 F.2d 838 (5 Cir. 1984). The *Webster* case involved a particularly shocking episode of police misconduct. Randell Allen Webster, 17-years old, stole a van

from a Dodge dealership in Houston and led police officers on a high-speed chase. Webster eventually lost control of the van and spun to a stop. He emerged from the van and was pushed to the ground by the police officers. He had no gun and put up no resistance. One of the police officers shot Webster in the back of the head. He died later that night. The police officers agreed to use a "throw down gun" to make it appear that Webster was armed at the time he was killed. In reversing a judgment against the City of Houston under §1983, the Fifth Circuit stated:

> "Under our standard this case turns on whether the City maintained a practice of allowing the use of excessive police force that was 'a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.' If actions of city employees are to be used to prove a custom for which the municipality is liable, those actions must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." 735 F.2d at 842.

The five dissenting judges on the en banc rehearing in *Webster* gave *Monell* a broader reading. They stated:

> "The Supreme Court recognized it was presenting only the faintest pencil sketch of the 'full contours of municipal liability under §1983' in *Monell*. It expressly deferred 'further development of this action to another day.' Id. at 695, 98 S.Ct. at 2038. The Supreme Court's 'other day' has yet to arrive.
>
> "This Court has only begun to flesh out the skeletal contours left by *Monell*. We have taken a relatively restrained view of the breadth of both official policy

> and governmental custom. Of course, we have held a city not to be liable under §1983 where there is no evidence that the deprivations occurred as a result of the city's policy or custom. * * * Our en banc decision in *Bennett v. City of Slidell*, 728 F.2d 762 (5 Cir. 1984) concisely stated this principle: 'Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy.'" 735 F.2d at 850, 851.

The dissenters found that the evidence in *Webster* made it clear that all members of the Houston Police Department were well aware of the "throw down" custom, and yet no specific steps were taken to stop it. In short, in the view of the dissenters, there was ample evidence to prove an unconstitutional custom well-known to high ranking officials of the City of Houston. The dissenters noted that the trial court had instructed the jury that the plaintiffs had to establish by the evidence "that there existed a regular pattern of such conduct" so that it could be inferred that the City of Houston through its high ranking officials implicitly authorized or approved such conduct. 735 F.2d at 853. Thus, the *Webster* majority would require evidence of unconstitutional action occurring "for so long or so frequently . . . that the objectionable conduct is the expected, accepted practice of city employees." The *Webster* minority would require evidence of "a regular pattern of such conduct." Either test is acceptable to the City of Oklahoma City. At a minimum, a plaintiff should be required to submit probative evidence of a regular pattern of unconstitutional deprivation of citizen's rights before municipal liability can attach under §1983.

On the same day that the Fifth Circuit issued its opinion on rehearing in *Webster*, the Eleventh Circuit issued

its opinion in *Gilmere v. City of Atlanta, Ga.*, 737 F.2d 894 (11 Cir. 1984). Gilmere's decedent, one Thomas Patillo, spent the afternoon of New Year's Day, 1980, drinking heavily. In an ensuing fracas with police officers, Patillo was shot twice in the abdomen and died shortly thereafter. The Eleventh Circuit stated plaintiff's theory under §1983 as follows:

> "The City allegedly deprived Patillo of these [constitutional] rights by promulgating a policy that permitted the deployment of untrained police officers and the use of excessive force in police-citizen encounters." 737 F.2d at 899.

The trial court entered judgment against the City of Atlanta on the ground that it had trained the policeman in a grossly negligent manner. Reversing the trial court, the Eleventh Circuit held that "gross negligence" was an inadequate basis for municipal liability under *Monell*.

> "Thus, *Monell* imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that policy is officially promulgated or authorized by custom. The official policy or custom 'must be the moving force of the constitutional violation in order to establish liability of a government body under §1983.'" [citing cases] 737 F.2d at 901.

The trial court in *Gilmere* had found that the police department's training of the offending officer had been so lacking as to constitute "gross negligence" or "deliberate indifference." 737 F.2d at 903. The Eleventh Circuit held that the question of whether the Atlanta Police Department had been negligent in training the police officer is "irrelevant under the *Monell* standard." Id. at 902. In holding the gross negligence-indifference standard insufficient under *Monell* to place liability on the City of Atlanta, the Eleventh Circuit stated:

> "'Gross negligence' or 'deliberate indifference' is simply not the proper test for adjudging a due process section 1983 claim against a municipality.
>
> "In summary, the plaintiff in this case presented, at best, an isolated incident in which the police officers used excessive force to restrain an arrestee. The plaintiff did not present an incident that was the product of a City or police department custom to use excessive force. • • • Patillo's injury at the hands of Officers Craig and Sampson was not caused by their execution of official municipal policy or of custom. Accordingly, the judgment against the City of Atlanta must be reversed." 737 F.2d at 904, 905.

D. The Decision of the United States Court of Appeals for the Tenth Circuit.

In the instant case, the trial court instructed the jury that Officer Rotramel had the defense of "good faith" immunity to protect him against the claims of the plaintiff. The jurors were told that if they found Officer Rotramel acted with a good faith belief that his actions were lawful and reasonable under the existing circumstances, they should return a verdict for Rotramel. The jury did so. The Tenth Circuit affirmed. It is difficult to harmonize the portion of the Tenth Circuit's opinion which affirmed the judgment in favor of Rotramel, with that portion of the opinion that affirmed the judgment against Oklahoma City. For example, the Tenth Circuit stated:

> "Defendant Rotramel admitted at trial *that he violated Police Department policy* in shooting Mr. Tuttle." 728 F.2d at 458-459. (Emphasis supplied.)

As noted, the "policy" of Oklahoma City was (and is) that police officers are not justified in using firearms ex-

cept in defense of life or where the suspect is armed and/or attempting to kill or do great bodily harm. The act of Rotramel in discharging his service revolver and thereby causing the death of William Tuttle, was at odds with the "official policy" of Oklahoma City. Thus, the first fork of the *Monell* test was not met under the circumstances surrounding this incident. But, regardless of the absence of such an official policy on the part of Oklahoma City, what about "custom"? As the Eleventh Circuit stated in *Gilmere v. City of Atlanta, Ga., supra:*

> "*Monell* limits what may constitute 'custom.' Custom consists of those practices of city officials that are 'so permanent and well settled' as to have 'the force of law.' Id. 436 U.S. at 691, 98 S.Ct. at 2036. In defining custom in this fashion the *Monell* Court borrowed language from *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970), which defines the term 'custom' as 'persistent and widespread . . . practices' or practices that are 'permanent and well settled' or 'deeply embedded traditional ways of carrying out . . . policy.' Id. Accord, *Bennett v. City of Slidell*, 728 F.2d 762 (5 Cir. 1984) (en banc). *Monell* additionally teaches that the city custom which may serve as the basis for liability may only be created by city 'lawmakers or those whose edicts or acts may fairly be said to represent official policy.' 436 U.S. at 694, 98 S.Ct. at 2037-38." 737 F.2d at 901, 902.

One does not have to define "custom" in the restrictive terms of *Monell* to see the flaw in plaintiff's proof in this case Here, there was a complete absence of *any* proof that Oklahoma City had a "custom" of blinking at the improper use of firearms by its police officers, much less a practice so "persistent and widespread" or "permanent and well settled" or "deeply embedded in traditional ways of carrying out policy" as to come within the *Monell* rule.

The facts are simply these: Officer Rotramel was trained for 18 weeks at taxpayer expense. Oklahoma City gave him the same training it gave all the other cadets in his class at the police academy. There was no showing that any other member of that class ever acted in a manner that betokened inadequate training, much less grossly inadequate training. There was no showing that any other Oklahoma City policeman used his weapon improperly.

How can it seriously be contended that Oklahoma City had "an official policy or custom" of giving its police officers grossly inadequate training? Where is the proof that would support such a bazaar contention? Such proof does not exist.

Even assuming more than *Monell* requires; that is, even *assuming* that "gross negligence" or "deliberate indifference" supply the standards by which municipal liability is to be tested under § 1983—and *Monell* does not say that by a long shot—such proof in the instant case is utterly wanting. Tested by the strict language of *Monell*—that is, *official policy or custom* of giving its police officers inadequate training, the proof in this case is directly contrary to the plaintiff's theory. Oklahoma City requires all of its police officers to undergo lengthy and rigorous training. And, Oklahoma City's official policy or custom is to sanction the use of firearms only under the most extreme circumstances of threatened mortal harm to the police officer or other innocent persons.

Thus, we come full circle: may a single incident of excessive force, coupled with the testimony of an expert witness that the officer was not properly trained to deal with the situation he confronted, provide the basis for

holding that the municipality had an "official policy or custom" of depriving its citizens of their constitutional and statutory rights?

It is respectfully submitted that more should be required. It is difficult to see what Oklahoma City could have done differently to anticipate and prevent the Rotramel/Tuttle incident. The City of Oklahoma City covers many square miles. It doesn't have the money to afford the luxury of putting two policemen in each cruiser. Oklahoma City's police force is spread thin. (Tr. 206.) Surely it is not too much to require that a plaintiff submit proof of some pattern of misbehavior that is sanctioned, or at least tolerated, by high ranking city officials, before the municipality itself may be held liable in damages under § 1983. Such a standard comports more readily with the notion that the citizens of the municipality, who bear the financial burden of the judgment through taxation, share in the responsibility for the event. In a democracy, such a standard at least harmonizes with the theory that the people are the ultimate sovereign.

SUMMARY

It is respectfully submitted that the decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

BURCK BAILEY
MARGARET MCMORROW-LOVE
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102
(405) 232-0621

Attorneys for Petitioner,
The City of Oklahoma City